Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 2003

Thomas Arthur Green, Sr.,

Petitioner,

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 28 U.S.C. § 2253, Governing Certificates Of Appealability In Habeas Actions, Prevents Appellate Review of Non-Constitutional Claims – A Question Which Has Divided The Lower Courts of Appeal.

II. Whether The Lower Court Misapplied The Standard For A Certificate Of Appealability By Prematurely Addressing The Merits, Contrary to *Miller-El v. Cockrell*.

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OPINIONS BELOW

Thomas Green respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. The lower court refused to grant a Certificate of Appealability and dismissed an appeal from the United States District Court for the District of Minnesota, which had denied Mr. Green's Application for Post-Conviction Relief pursuant to 28 U.S.C. § 2255. The unpublished order of the court of appeals is included in the Appendix (hereinafter "App., *infra*, __A") (App., *infra*, A1), as is the unreported opinion of the federal district court (App., *infra*, A2-A10).

JURISDICTION

The court of appeals issued its opinion December 30, 2002. (App., *infra*, A1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Petitioner's Sixth Amendment right to effective assistance of counsel (App., *infra*, A11), as well as the federal statute governing post-conviction relief for prisoners convicted in federal court, 28 U.S.C. § 2255 (App., *infra*, A12), and the statute governing Certificates of Appealability, 28 U.S.C. § 2253(c). (App., *infra*, A14).

INTRODUCTION AND PROCEDURAL HISTORY

Petitioner Thomas Arthur Green, Sr., was convicted at trial of one count of conspiracy to commit wire fraud, fifteen counts of wire fraud, and one count of conspiracy to commit money laundering. The district court sentenced Mr. Green to 135 months in the custody of the Bureau of Prisons. The lower court affirmed the conviction on direct appeal. *United States v. Green*, 225 F.3d 955 (8th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001).

Before trial, the district court twice rejected Mr. Green's attempts to plead guilty, finding that the misrepresentations that Mr. Green admitted during the plea colloquy were not material and did not constitute a crime. Yet at trial, the government's evidence consisted entirely of these same misrepresentations. Witness after witness testified to having invested in the petitioner's scheme on the basis of misrepresentations that were identical to those admitted by Mr. Green -- misrepresentations that the district court had held were immaterial. In other words, the same misrepresentations that the district court held were not a crime when Mr. Green tried to plead guilty were the basis for his conviction at trial. Yet trial counsel never objected to the admission of this immaterial and inflammatory evidence.

Mr. Green filed a timely motion for relief under 28 U.S.C. § 2255 January 9, 2002. He asserted that he was denied effective assistance of counsel by the failure of trial counsel to object to the admission of evidence of misrepresentations held to be immaterial by the district court, and he requested an evidentiary hearing. Alternatively, if the misrepresentations were material, Mr. Green argued, then the district court erred in rejecting his guilty plea. By Order entered August 5, 2002, the district court denied Mr. Green's motion without an evidentiary hearing. In addition, the district court *sua sponte* denied issuance of a certificate of appealability. (App., *infra*, 2A-10A).

Mr. Green filed a timely notice of appeal, seeking leave to appeal the district court's judgment. On December 30, 2002, the Court of Appeals, without comment, denied Mr. Green's request for a Certificate of Appealability, and dismissed his appeal. (App., *infra*, 1A).

REASONS FOR GRANTING THE PETITION

I.
THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS REGARDING APPLICATION OF THE CERTIFICATE OF APPEALABILITY TO NON-CONSTITUTIONAL CLAIMS

The Court of Appeals denied Petitioner's request for a Certificate of Appealability, and dismissed his appeal, apparently on the belief that a district court's refusal to accept a guilty plea raises no constitutional issue. A COA may issue under 28 U.S.C.2253(c) where a petitioner has made a substantial showing of the denial of a constitutional right. Whether the requirement under 28 U.S.C.2253(c) governing COAs prevents appellate review of all non-constitutional claims is a question that has divided the lower courts of appeal. The split in the lower courts matters in this case because one of Petitioner's claims---that the district court erred when it rejected his guilty plea under Fed. R. Crim. P. 11---involves a violation of a federal non-constitutional right. The Court should grant review to resolve the conflict among the lower courts regarding the application of the COA standard to federal non-constitutional claims.

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Section 2253(c)(1) of Title 28, United States Code, provides, in relevant part, that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -- ... (B) the final order in a proceeding under section 2255." Section 2253(c)(2) further provides that a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

Prior to the AEDPA, § 2253 did not specify the standard a petitioner had to meet in order to obtain a

certificate of probable cause (as the authorization to appeal was then called). In *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), however, the Court held that to obtain a certificate of probable cause under the former statute, a habeas petitioner must present a "substantial showing of the denial of a *federal* right." (emphasis added). In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Court held that the AEDPA merely codifies the standard previously articulated by the Court in *Barefoot. Id. at* 483-84 (2000) (except for substituting the word "constitutional" for the word "federal," Section 2253 codifies standard announced in *Barefoot).*

A.

The Split Among The Lower Courts Regarding The Application Of Certificates Of Appealability To Non-Constitutional Claims

As the Court noted in *Slack v. McDaniel*, 529 U.S. at 484, although § 2253(c)(2)'s application to constitutional issues is "straightforward," "[t]he issue becomes somewhat more complicated" when the case presents a non-constitutional question. This "complicated" issue has divided the lower courts.

Several lower courts strictly construe § 2253(c)(2) to confer appellate jurisdiction over only those issues substantially shown to deny a petitioner a constitutional right. In *United States v. Cepero,* 224 F.3d 256 (3d Cir. 2000) (*en banc*), *cert denied*, 121 S.Ct. 861 (2001), for example, the district court had issued a certificate of appealability where the sentencing court erred in enhancing petitioner's sentence under the federal sentencing guidelines. The Third Circuit disagreed, holding that a certificate of appealability under 28 U.S.C. § 2253(c)(2) may issue, in the literal language of the statute, "only if the applicant has made a substantial showing of the denial of a constitutional right." 224 F.3d at 267. The appellate court found that the petitioner's sentencing

guidelines claim did not qualify for a COA because it "does not present a constitutional issue under § 2253 (c)(2)." *Id.*

The Fourth, Seventh and Eighth Circuits have similarly held that a COA may extend only to constitutional claims. In *United States v. Hohn*, 99 F.3d 892, 893 (8th Cir. 1996) (*per curiam*), *vac'd & remanded*, 524 U.S. 236 (1998), the petitioner sought to have his sentence set aside based on the argument that jury instructions at trial dealing with what it means to use a firearm did not conform to the principles outlined in *United States v. Bailey*, 516 U.S. 137 (1995). The court of appeals held that petitioner's application did not meet the standard for a COA under § 2253(c). In the court's view, "*Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution." *Hohn*, 99 F.3d at 893. Given this determination, the court declined to issue a COA.[1]

Likewise, in *Murphy v. Netherland*, 116 F.3d 97 (4th Cir.), *cert. denied*, 521 U.S. 1144 (1997), petitioner sought habeas corpus relief from his Virginia convictions for murder-for-hire and conspiracy to commit capital murder and from his death sentence. Petitioner claimed, among other things, that both his conviction and death sentence were constitutionally invalid because the Virginia authorities failed to notify him that, as a Mexican national, he had a right under the Vienna Convention on Consular Relations to contact the consulate of Mexico. The appellate court found that

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[1] Judge McMillian dissented. In his view, *Bailey* cast doubt on whether Hohn's conduct in fact violated 18 U.S.C. § 924(c)(1). The Due Process Clause, he reasoned, does not "tolerat[e] convictions for conduct that was never criminal," so Hohn had made a sufficient showing of a constitutional deprivation. 99 F.3d at 895. When the Court of Appeals denied Hohn's rehearing petition and a suggestion for rehearing en banc, four judges noted they would have granted the suggestion.

petitioner's arguments under the Vienna Convention did not satisfy § 2253(c)(2):

> [E]ven if the Vienna Convention on Consular Relations could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional rights*. Although states may have an obligation under that Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless whether those provisions can be said to create individual rights) into violations of constitutional rights. Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty.

Id. at 100. *See also United States v. Buggs*, 153 F.3d 439, 443 (7th Cir. 1998) (denying certificate of appealablity and claim of error in implementation of sentencing guidelines because "claim raises no constitutional issue").

Other lower courts, have found that non-constitutional statutory claims that contain a "constitutional dimension" can qualify for a certificate of appealability. In *United States v. Gobert*, 139 F.3d 436 (5th Cir. 1998), for example, a petitioner pleaded guilty to using a firearm during a drug-trafficking offense in violation of U.S.C. § 924(c)(1). Subsequent to petitioner's conviction, the Supreme Court decided *United States v. Bailey*, 516 U.S. 137 (1995), requiring proof that a defendant actually employed a firearm during the predicate drug offense to support a conviction under the "use" prong of the statute. Petitioner filed a motion to vacate his sentence under § 2255 on the ground that his pre-*Bailey* conviction

could no longer stand. In light of the Supreme Court's interpretation of § 924(c)(1), the circuit court held that petitioner had made a substantial showing of the denial of his right to due process as required by § 2253(c)(1). In so holding, the court criticized the Eighth Circuit's decision in *Hohn, supra*:

> Many courts, including this court, have stated that *Bailey* announced only a new statutory interpretation and not a rule of constitutional law. [footnote omitted]. We continue to abide by this proposition. In *Hohn v. United States*, however, the Eighth Circuit parlayed this understanding into an entirely different proposition with which we cannot agree – that a prisoner who challenges his conviction in light of the new standards articulated in *Bailey* is not entitled to a COA. *Hohn*, 99 F.3d at 893. It refused to issue a COA to a post-*Bailey* petitioner because '[he was] not making a constitutional claim. He [was] making a claim to a federal statutory right.' *Id.*
>
> We do not so characterize [petitioner's] contention. Even though *Bailey* itself is a statutory, non-constitutional case, it does not necessarily follow that a prisoner's post-*Bailey* petition for collateral relief sounds in statutory, non-constitutional law. We conclude, in fact, that the claim falls squarely within the ambit of the Fifth Amendment.

Id. at 438. *See also Buggs, supra* at 443-45 (seemingly non-constitutional statutory claim actually has constitutional dimension and so could qualify for a certificate of appealablity); *Hohn*, 99 F.3d 892, 893 (8th Cir. 1996) (*per*

curiam), *vac'd & remanded*, 524 U.S. 236 (1998) (court of appeals, viewing claim as non-constitutional, denies certificate of appealablity; on *certiorari*, Supreme Court, treating court's ruling on scope of certificate of appealablity as "law of case" because *certiorari* was not granted on issue, vacates and remands for further consideration of government's new position that petitioner's claim actually *is* constitutional in nature); and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*) (relying on various grounds to deny stay pending *certiorari* to hear treaty claim but not explicitly mentioning nonappealability of non-constitutional treaty claim as basis for denial of stay).

The Court should grant review to resolve the conflict among the lower courts regarding the application of the COA standard to non-constitutional claims. The Government may assert that rejection of a plea agreement does not raise a constitutional issue for which a COA may issue. Statutory or other non-constitutional claims are properly cognizable in a motion under 28 U.S.C. § 2255 if the error is "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). *See, e.g., United States v. Ammar*, 919 F.2d 13, 15-17 (3d Cir. 1990) (§ 2255 motion is proper method to challenge court's violation of Fed. R. Crim. P. 43); *Cox v. Warden*, 911 F.2d 1111, 1114 (5th Cir. 1990) (§ 2255 motion is proper method of challenging errors in imposition of supervised release); *Risken v. United States*, 899 F.2d 728, 730 (8th Cir. 1990) (*per curiam)* (motion to correct presentence report under Fed. R. Crim P. 32 cognizable under § 2255). *Cf. United States v. Timmreck*, 441 U.S. 780, 783-85 (1979) ("technical violation" of guilty plea rule not sufficiently fundamental absent any showing of "special prejudice" or "other aggravating circumstances). 28 U.S.C. § 2253 should not be interpreted to preclude appeal when a petitioner makes a substantial showing of a violation of a right cognizable under 28 U.S.C. § 2255, even if the claim does not state a violation of the

Constitution. At a minimum, this Court should grant *certiorari* to allow full briefing on the issue of whether a court may issue a COA upon a substantial showing of a violation of a federal non-constitutional right.

B.

Reasonable Jurists Could Disagree With The District Court's Determination That Rejecting Petitioner's Guilty Plea After He Admitted Guilt Complied With The Requirements Of Rule 11.

In its Order denying Mr. Green's ineffective assistance of counsel claim, the district court asserted, contrary to its statements at the time of Mr. Green's attempted guilty plea, that the misrepresentations made by Mr. Green to prospective customers were material and "constituted sufficient evidence of a scheme to defraud" (App., *infra*, A7). The misrepresentations enumerated by the district court, however, were identical to the misrepresentations Mr. Green admitted during his guilty plea colloquy. If, as the district court maintained in it order, those misrepresentations "constituted sufficient evidence of a scheme to defraud," then Mr. Green provided a sufficient factual basis for his guilty plea. The district court abused its discretion, therefore, when it rejected Mr. Green's guilty plea and proceeded to trial. The Court of Appeals, however, denied a COA, apparently on the belief that a district court's refusal to accept a guilty plea raises no constitutional issue. *See Hohn*, *supra* at 893 (in Eighth Circuit, COA issues only for violations of constitutional rights).

This Court long ago recognized that "'plea bargaining' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Plea-bargaining "leads to prompt and largely final disposition of most criminal cases," *id.* at 261, and avoids "the spectacle and expense of protracted courtroom proceedings" for both

the defendant and the government. *United States v. Jackson*, 390 U.S. 570, 584 (1968).

A defendant has no absolute right to have a guilty plea accepted. *Santobello*, 404 U.S. at 262. Even so, "the fact that . . . guilty pleas may occasionally be rejected hardly implies that all defendants may be required to submit to a full-dress jury trial as a matter of course." *Jackson*, 390 U.S. at 584. Rather, the decision whether to accept or reject a guilty plea is a matter left to the sound discretion of the court. *See Santobello*, 404 U.S. at 262; *United States v. McGovern*, 822 F.2d 739, 742 (8th Cir. 1987) ("court may reject a guilty plea in the exercise of its sound judicial discretion"); *United States v. LeMay*, 952 F.2d 995, 997 (8th Cir. 1991) (district court's decision to accept or reject plea agreements is "a discretionary task, reviewable on an abuse of discretion standard").

In exercising that discretion, a court may not reject a plea on an arbitrary basis. *See United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990). "[A] defendant is entitled to plead guilty unless the district court can articulate a sound reason for rejecting the plea." *United States v. Delegal*, 678 F.2d 47, 50 (7th Cir. 1982). *See also United States v. Maddox*, 48 F.3d 555, 558 (D.C. Cir. 1995) ("trial judge must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense") (*quoting United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973)); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir. 1995) (requiring district courts to set forth on the record court's justification for rejecting plea). *Cf. United States v. Bettelyoun*, 503 F.2d 1333, 1336 n. 3 (8th Cir. 1974) ("better practice" is for district court to set forth its reasons for rejecting a guilty plea).

The district court rejected Mr. Green's plea because, according to the court, Mr. Green failed to admit that he made any material false statement that would constitute a crime ("petitioner failed to make these necessary admissions"). *See*

Transcript of Attempted Change of Plea at pp. 23, 31-32 (hereinafter "Plea Tr. __"); (App., *infra*, A8). The record belies this claim.

Before attempting to enter his guilty plea, Mr. Green, his counsel, and the government, executed a plea agreement that set out in great detail the factual basis for the plea. In that agreement, Mr. Green admitted that from 1991 through 1994, Mr. Green "did knowingly and intentionally conspire with Steven Michael Green and Thomas Arthur Green, Jr., a/k/a 'Art' Green to obtain money from automobile body shop owners and others by selling distributorships for convertible car top conversion kits through false statements, representations and promises." *See* Plea Agreement and Sentencing Stipulations ¶1. Among the fraudulent misrepresentations that, in the Plea Agreement, Mr. Green admitted having made were that his company would grant distributors exclusive sales territories that the company had conversion car top kits for virtually all makes and models of cars, that the company had prospective customers to refer to new distributors, and that the company would provide ongoing customer referrals. Mr. Green admitted in the Plea Agreement that these representations "were false, fraudulent, or misleading." *See* Plea Agreement and Sentencing Stipulations ¶1.

At his change of plea, Mr. Green confessed to the same misconduct he had already admitted in the Plea Agreement. He admitted that "we made false statements to people . . . to encourage them to send – invest in our company." *See* Plea Tr. 26. This is the essence of fraud. Specifically, he admitted that in attempting to market his product he represented to body shop owners that they were going to obtain exclusive distributorships that they were going to receive Green's assistance in marketing and finding customers, that he already had prospective customers waiting, and that he had kits for virtually every model and make of car. *See* Plea Tr. 28. Mr. Green admitted that when he made

those statements, he "knew that they were either misleading or exaggerations or untrue." *See* Plea Tr. 29. Finally, to complete the factual basis for money laundering, Mr. Green admitted that the money that he obtained through fraud was used to further and promote his fraudulent business. *See* Plea Tr. 30-31.

Both in the Plea Agreement and before the court, therefore, Mr. Green admitted that he had defrauded the distributors to whom he marketed his product. Promises of exclusivity, waiting customers, availability of kits, and marketing assistance went directly to the value of the investment prospective distributors were being asked to make. Plainly, these representations were material, as the district court now apparently agrees. In denying Mr. Green's claim of ineffective assistance of counsel, the district court explained as follows:

> The misrepresentations that caused the victims to contribute money to petitioner's scheme (e.g., that petitioner's company had a product, that the product was available, that the company had customers waiting and would provide further customer referrals, and that the body shop owners were purchasing an exclusive territory) constituted sufficient evidence of a scheme to defraud.

(App., *infra*, A6-A7).

Each of the misrepresentations enumerated by the court as "sufficient evidence of a scheme to defraud" at trial, Mr. Green had admitted making, first in the plea agreement and then during the plea colloquy. The district court, therefore, abused its discretion by rejecting Mr. Green's guilty plea based on the erroneous finding that he had not admitted a crime.

In *United States v. Bettelyoun*, 503 F.2d 1333 (8th Cir. 1974), the Eighth Circuit considered a somewhat analogous situation. The defendant there was charged with assault with a deadly weapon. As part of a plea agreement he agreed to plead guilty to a misdemeanor charge of simple assault. During the guilty plea hearing, the defendant denied having struck the victim and denied that he had a weapon. He did, however, admit that he had acted in a way that the victim might have thought the defendant was going to strike him – the elements of simple assault. Nonetheless, the district court refused to accept the guilty plea.

On appeal, the defendant argued that the district court had abused its discretion by refusing to accept the guilty plea. The court observed,

> It appears that the defendant acknowledged facts constituting simple assault. It is possible to infer from the record that the court refused to accept his plea because he would not admit to actions constituting the greater crime of assault with a deadly weapon. *If this was the basis for the court's decision, a serious question concerning abuse of discretion would be present.*

Id. at 1335 (emphasis added). The court did not decide this serious question because it found that the defendant had not properly preserved the issue.

The concerns raised in *Bettelyoun* are even starker here. Mr. Green admitted a series of misrepresentations by which he fraudulently induced his victims to invest in his scheme. The trial court found that these misrepresentations were not material and forced Mr. Green to go to trial, where the government based its case on the exact same misrepresentations, which, the court said, were not criminal. The district court abused its discretion, and Mr. Green was

deprived of the benefit of his plea agreement as a result. Instead of being permitted to plead to one count, he instead was convicted of 17 separate counts after trial. Instead of the 78-month sentence he expected pursuant to his Plea Agreement, he was sentenced to 135 months.

This is no mere technical violation of Fed. R. Crim. P. 11. Instead, the district court's error severely prejudiced Mr. Green and "was inconsistent with the rudimentary demands of fair procedure." *See Hill v. United States,* 368 U.S. 424, 428 (1962); *Reed v. Farley*, 512 U.S. 339, 354 (1994). Plainly, reasonable jurists could disagree about whether the district court abused its discretion when it rejected Mr. Green's guilty plea. Accordingly, this Court should grant *certiorari*, vacate the decision of the lower court, and remand for reconsideration to permit full review of the merits of this claim.

II.

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE LOWER COURT ROUTINELY MISAPPLIES THE STANDARD FOR A CERTIFICATE OF APPEALABILITY

The Court of Appeals denied Petitioner's request for a Certificate of Appealability, and dismissed his appeal. Since that time, however, this Court issued its decision in *Miller-El v. Cockrell*, ___ S.Ct. ___, 2003 WL 431659 (Feb. 25, 2003). In *Miller-El*, the Court reaffirmed that the lower courts must not prematurely terminate a Petitioner's appeal by concluding, without the benefit of plenary appellate review, that he is not likely to prevail on the merits:

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would

> grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack* [*v. McDaniel* 529 U.S. 473, 483-84 (2000)], '[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'

Id. at ___.

The inescapable implication of *Miller-El* is that, at least in most cases, appellate courts cannot form a reliable impression of a lower court decision without the benefit of "full consideration". *Miller-El* thus recognizes that the abbreviated review undertaken by the courts of appeal when they decide whether to grant a COA is often unequal to the task of determining whether the plaintiff is ultimately entitled to relief. Accordingly, the lower courts should undertake only the "threshold" determination of whether the issue "deserves encouragement to proceed further," *Slack v. McDaniel,* 529 U.S. 473, 482-84 (2000) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)), as opposed to a review that purports to qualify as plenary appellate consideration.

But as the following discussion makes plain, the lower court – like the Fifth Circuit in *Miller-El* – ignored this implication and evidently denied a COA because it concluded, without the benefit of meaningful review, that Petitioner would not prevail on the merits. This is routinely the practice in the Eighth Circuit. *See, e.g., Khaimov v. Crist*, 297 F.3d 783, 785 (8th Cir. 2002) (vacating previously

granted COA after determining, without full consideration, that appeal lacked merit). The lower court erred and the Court should grant *certiorari*, vacate the decision of the lower court, and remand for reconsideration in light of *Miller-El*.[2]

A.

Reasonable Jurists Could Disagree With The Determination By The District Court That Petitioner Received Effective Assistance Of Counsel At Trial

Mr. Green alleged in his habeas petition that counsel failed to make necessary objections to evidence at trial previously found by the district court to be immaterial. *See* Memorandum In Support Of Petition For Writ Of Habeas Corpus Pursuant To 28 U.S.C. 2255 And Motion For Evidentiary Hearing at pp. 3-24. Mr. Green's claim of ineffective assistance of counsel was supported by his trial counsel who, in an affidavit submitted to the district court, agreed that he failed to make necessary objections to evidence presented at trial and that the failure was not the product of a tactical or strategic decision. *See* Affidavit of Scott Tilsen, para. 6. The district court nonetheless concluded that Mr. Green had failed to establish that his attorney's performance was deficient or that counsel's inaction altered the course of the proceedings. (App., *infra*, A5-A7). The Court of Appeals denied a COA, apparently on the belief that Mr. Green could not prevail on the merits.

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[2] In the Second Reason for Granting the Writ, Mr. Green addresses only whether the lower court misapplied the standard for a COA in its rejection of the Sixth Amendment claim. In the First Reason for Granting the Writ, Mr. Green addresses whether the Court should grant review to resolve the conflict among the lower courts regarding the application of the COA standard to non-constitutional claims.

To appreciate the nature and extent of the harm Mr. Green suffered as a result of his counsel's ineffective assistance, it is necessary to review in detail the procedural history of Mr. Green's attempts to plead guilty before trial and the alleged misrepresentations relied upon by the Government at trial.

Prior to trial, Mr. Green entered into a negotiated plea agreement with the Government that provided for him to plead guilty to Count 17 of the Indictment (Conspiracy to Commit Money Laundering). *See* Plea Agreement and Sentencing Stipulations. In this agreement, Mr. Green admitted he "knowingly and intentionally conspire[d]" with his co-defendants, "to obtain money from automobile body shop owners and others by selling distributorships for convertible car top conversion kits through false statements, representations and promises." *Id.* at 1.

At his change of plea hearing, Mr. Green enumerated the misrepresentations by which he had defrauded prospective customers. He told the district court he had induced his victims to invest by telling them his company would give prospective auto body shops exclusive distributorships, the company would provide aid and assistance in marketing and finding customers, the company had prospective customers waiting for them, and the company had kits for virtually every make and model of car. *See* Plea Tr. at 28-29. Mr. Green admitted all of these claims were "either misleading, or exaggerations or untrue." *See* Plea Tr. at 29. The district court rejected Mr. Green's plea because, according to the court, he had failed to admit he made any material false statements that would constitute a crime. *See* Plea Tr. 25, 31-32; (App., infra, A8).

Trial began six days later. The overwhelming bulk of the Government's case was devoted to the testimony of twenty auto body shop owners, each of whom testified to the same misrepresentations Mr. Green had admitted --and the district court had

discounted -- in his attempted change of plea. Typical was Government witness Steve Benkovitz, who owned a body shop in Cleveland, Ohio. Benkovitz testified that in early 1993, a Bob Bodine [a fictitious name used by defendants] contacted him about becoming a convertible top distributor in the Cleveland area. According to Benkovitz, Bodine made a number of verbal promises to entice Benkovitz to become a distributor for Bodine's company. Bodine promised the company would refer customers to Benkovitz, give Benkovitz an exclusive territory consisting of an area 60 or 70 miles from his auto body shop in Cleveland, and advertise on Benkovitz' behalf. *See* Trial Transcript. at 246. In all relevant respects, in other words, Benkovitz' testimony mirrored Mr. Green's pretrial admissions. And each of the witnesses after Benkovitz followed his lead.

Mr. Green's trial counsel, knowing these representations were immaterial based on the district court's rejection of Petitioner's plea six days earlier, failed to object to their admission. As trial counsel now admits, this oversight was neither a strategic nor a tactical decision; on the contrary, it was simply ineffective assistance. *See* Affidavit of Scott Tilsen.

B.

The Determination That Trial Counsel's Representation Did Not Fall Below An Objective Standard Of Reasonableness Is Debatable Among Jurists Of Reason

The district court cited no particular reason for its conclusion that trial counsel did not render a deficient performance. Instead, the court simply discounted trial counsel's acknowledgement of error as the sign of a "zealous advocate." In its Order, the court states:

> It has been observed that in the legal profession it is often the most able and conscientious practitioners who are ready to

> confess error---both real and imagined, substantial and trivial. This stems from a lawyer's duty to be a zealous advocate for his or her client. But an attorney's acts of contrition are not a reliable constitutional measure of claimed incompetence.

(App., *infra*, A6). The court's comments provide no real basis for finding counsel's performance competent. When counsel's ineffectiveness is at least debatable among reasonable jurists, a COA should issue to review whether counsel's performance was in fact deficient.

Mr. Green's claim requires him to first show that counsel's performance was objectively deficient. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Applying this standard, a number of courts have recognized that counsel can be ineffective for failing to object to the improper admission of immaterial, prejudicial, or inflammatory evidence. *See, e.g., Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996) (ineffective assistance of counsel constituted "cause and prejudice" sufficient to allow federal court to review claim that was not preserved in state court; trial counsel was ineffective for repeatedly failing to object to prosecution's improper comments concerning defendant's post arrest silence and for failing to preserve these issues by way of the post- trial motion for new trial); *Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996) (counsel ineffective in assault on police officer case for failure to object to prosecution's cross-examination of defendant concerning a boastful statement made to a third party that he had previously "killed a cop" where the jury was aware that defendant was on parole for an undisclosed felony and there was no evidence that statement was true).[3]

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[3] *See also Mason v. Scully*, 16 F.3d 38 (2nd Cir. 1994) (counsel ineffective for failure to object to testimony by

Here, reasonable jurists could certainly debate whether trial counsel's performance was objectively deficient – that is, whether counsel performed with the skill and diligence that a reasonably competent attorney would exercise under similar circumstances. *See Strickland*, 466 U.S. at 687-88. Counsel failed to object at trial to the improper admission of evidence of the very same misrepresentations that the trial court had previously held were immaterial and did not constitute a crime. This oversight was not a tactical decision; it was ineffective assistance, as trial counsel now admits.

C.
The Determination That Petitioner Failed To Show "Prejudice" Is Debatable Among Jurists Of Reason.

Mr. Green must also establish that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88. A petitioner demonstrates "prejudice" by showing a "reasonable probability" that the result of the trial would have been different but for counsel's error. *Id.* at 694. A "reasonable probability" is sufficient to undermine the court's confidence in the outcome of the trial. *Id.* Importantly, *Strickland* does not require proof that the errors of counsel were outcome-determinative, only that they rendered the result of the proceeding "unreliable." *Id.*

The district court concluded that Mr. Green failed to show undue prejudice. The court explained as follows:

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police detective about hearsay statement of non-testifying co-defendant); *Atkins v. Atty. Gen. of Alabama*, 932 F.2d 1430 (11th Cir. 1991) (counsel ineffective for failing to object to fingerprint card with notation regarding previous arrest being admitted into evidence); *Chatom v. White*, 858 F.2d 1479 (11th Cir. 1988) (counsel ineffective for failing to object to admission of atomic absorption tests results).

> The only misrepresentations deemed immaterial during [Petitioner's] attempted plea were his use of false names to further his scheme. (T, attempted pleas, 31-32.) The government did not argue, nor did the Court believe, that these misrepresentations were necessary components of the crimes charged.
>
> * * *
>
> Therefore, petitioner's case was in no way prejudiced by his counsel's silence; since use of false names was not an essential component of the crimes charged, counsel's inaction did not alter the course of the proceedings

(App., *infra*, A6-A7).

If, as the district court now asserts, "the only misrepresentations deemed immaterial" during Mr. Green's attempt to plead guilty were his use of false names, then the other misrepresentations he admitted provided a sufficient factual basis for the plea. Yet, the district court rejected Mr. Green's guilty plea, and the only basis it articulated for doing so was that the misrepresentations he had admitted were not material. *See* Plea Tr. 31-32. Moreover, before rejecting the plea, the court repeatedly demanded further elaboration of the nature of the misrepresentations, which corroborates the court's view that Mr. Green's admissions were not sufficient. *See* Plea Tr. 26, 29. Notwithstanding its current view of the record, at the time of the plea, the district court had concluded that Mr. Green had failed to admit a material misrepresentation and, therefore, failed to admit a crime. Accordingly, the court rejected Mr. Green's plea.

Had trial counsel objected to evidence of these same misrepresentations (and had the court been consistent in its view that those misrepresentations were not material), the

great bulk of the Government's evidence would have been excluded. If that had happened, no reasonable juror would have convicted Mr. Green. Mr. Green, therefore, has demonstrated clear prejudice arising from his trial counsel's ineffective representation, and he is entitled to relief. At a minimum, reasonable jurists could disagree about the constitutional significance of trial counsel's failure to object.

CONCLUSION

Mr. Green requests that his Petition be granted and the matter be scheduled for plenary consideration. In the alternative, Mr. Green requests that the Court grant *certiorari*, vacate the judgment below, and remand with directions either to reconsider its decision based on *Miller-El v. Cockrell*, ___ S.Ct. ___, 2003 WL 431659 (Feb. 25, 2003), or with directions that the Court of Appeals should issue a Certificate of Appealability and allow Mr. Green an appeal of the district court decision.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3583		
Thomas Arthur Green, Sr.,	*	
Appellant,	*	Appeal from the
	*	United States
v.	*	District Court for
	*	the District of
	*	Minnesota
United States of America,	*	
Appellee.	*	

Before BOWMAN, WOLLMAN and LOKEN, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.
(5361-010199)

December 30, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
97-CR-159(JMR/AJB)
02 -CV-49 (JMR)

United States of America	)
	)
v.	) ORDER
	)
Thomas Arthur Green, Sr.	)

Petitioner, Thomas Arthur Green, Sr., seeks relief under 28 U.S.C. § 2255 and requests an evidentiary hearing claiming ineffective assistance of counsel, or alternatively, error by the Court in failing to accept his plea. Petitioner's motion and request is denied.

I. Factual Background

From 1991 to 1994, petitioner operated a fraudulent telemarketing scheme with his son, Thomas Arthur Green, Jr., and nephew, Stephen Michael Green, in which they claimed to manufacture kits used to turn hard-top cars into convertibles. They contacted auto body repair shops throughout the United States, and for a $40 fee, sold them a promotional video and a "confidential business plan." The Greens told potential investors they had an inventory of over 70 types of conversion kits; that they were the world's largest manufacturer of these kits; and that the kits were "original manufacturer quality." In reality, they had only a few rusted frames and fabric convertible tops.

Through their promotional materials and telephone calls they sold exclusive "distributorships" to auto body shops

at a minimum cost of $3,500[4], which allowed the shops the uncontested right to install the conversion kits within a specified geographic area. Over the four year period of operation, the Greens defrauded small business owners of over $2,000,000. A large portion of this money was funneled through seven bank accounts and reinvested into the scheme.

II. Procedural History

The Greens were charged with one count of conspiracy to commit wire fraud, fifteen counts of devising and carrying out a scheme to defraud, and one count of conspiracy to commit money laundering. Petitioner attempted to plead guilty twice; but the Court rejected his pleas for failure to provide a sufficient factual predicate.

The case was then tried to a jury, and the Greens were found guilty on all counts and $830,000.00 subject to forfeiture. On March 29, 1999, the Court sentenced petitioner to 135 months. Petitioner appealed his conviction to the Eighth Circuit Court of Appeals, which affirmed the judgment of the Court in all respects. United States v. Green, 225 F. 3d 955 (8th Cir. 2000), cert. denied 531 U.S. 1131 (Jan. 22, 2001). Petitioner filed this motion on January 1, 2002.

II. Discussion

A. Ineffective Assistance of Counsel

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[4] The Greens obtained this money in stages; first, by obtaining a $150 application fee, and then collecting a down payment to secure the exclusive territory and to front the cost of the kits. The actual costs incurred by the victims ranged from $3,500 to $18,000, depending on the number of kits they requested.

Petitioner's allegation of ineffective assistance of Counsel is supported by an affidavit from his attorney, Scott Tilsen, wherein Mr. Tilsen states he failed to make necessary objections to evidence presented at trial, and in retrospect, this failure was not the product of a tactical or strategic decision. (Tilsen Aff. ¶ 6.) Petitioner asserts Mr. Tilsen's failure to object resulted in his conviction, because some of the testimony relied on in trial had previously been deemed immaterial during his attempted guilty pleas. He claims that, had Mr. Tilsen objected to this evidence, it would have been excluded, making it impossible for the government to meet its burden of, proof.

The United States Supreme Court has established a two-prong standard for evaluating claims of ineffective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the court stated that in order to bring a successful claim of ineffective assistance of counsel, a petitioner must establish (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 688, 694. When considering an attorney's performance, a court should presume that attorney's representation was competent, and that the challenged decisions constituted strategic and tactical ones. See id. at 689.

In order to satisfy the deficiency requirement, a petitioner must show "counsel was not functioning as counsel guaranteed by the Constitution," and the lawyer's acts or omissions were not the "result of reasonable professional judgment." Id. at 690. Moreover, a fair assessment of attorney effectiveness requires that "every effort be made to eliminate the distorting effects of hindsight," and to "evaluate the conduct from counsel's perspective at the time." Id. at 698. To meet the prejudice prerequisite, a petitioner must show

counsel's performance rendered the' trial proceedings fundamentally unfair or unreliable. See El-Tabach v. Hopkins, 997 F.2d 389 (8th Cir. 1993).

Here, petitioner has not demonstrated his attorney's performance was deficient. The evidence submitted for evaluation does not shed light on how his representation fell below an objective standard of reasonableness. Rather, he relies solely on an affidavit written by his attorney, wherein it is stated: "[i]n hindsight, I believe - in light of Judge Rosenbaum's ruling - the objection [to their introduction] would have been appropriate." (Tiisen Aff. ¶ 6.) The Supreme Court has stressed the dangers of such retrospective reevaluations. Strickland, 466 at 689. Ours is a judicial system that values finality. Allowing attorneys to freely second-guess their own effectiveness would -mean that every criminal trial resolved unfavorably to a defendant would result in yet another trial - - this one concerning attorney performance. See id. at 690.

It has been observed that in the legal profession it is often the most able and conscientious practitioners who are ready to confess error -- both real and imagined, substantial and trivial. This stems from a lawyer's duty to be a zealous advocate for his or her client. But an attorney's acts of contrition are simply not a reliable constitutional measure of claimed incompetence. See United States ex rel Rosner v. Commissioner New York State Dep't of Corrections, 421 F. Supp. 781 (D.C.N.Y. 1976). Petitioner, therefore, has not proven ineffective assistance of counsel.

Petitioner also has not satisfied Strickland's second requirement - undue prejudice. The only misrepresentations deemed immaterial during his attempted guilty plea were his use of false names to further his scheme. (T, attempted pleas, 31-32.) The government did not argue, nor did the Court believe, that these misrepresentations were necessary

components of the crimes charged. The materiality of the misrepresentations relied upon to establish wire fraud, however, was never addressed by the Court. The misrepresentations that caused the victims to contribute money to petitioner's scheme (e.g., that petitioner's company had a product, that the product was available, that the company had customers waiting and would provide future customer referrals, and that the body shop owners were purchasing an exclusive territory) constituted sufficient evidence of a scheme to defraud. Therefore, petitioner's case was in no way prejudiced by his counsel's silence; since use of false names was not an essential component of the crimes charged, counsel's inaction did not alter the course of the proceedings.

Beyond petitioner's failure to meet both requirements of the Strickland standard, the Court emphasizes that it has already been quite attentive to this matter. Petitioner has repeatedly expressed concern with his representation. In response, the Court permitted him to replace his attorney on one occasion, and otherwise duly considered his expressions of concern. Based on the Court's direct observation, there is no way that counsel was
deficient; instead, he was in all regards zealous and competent.

B. Rejection of Plea

Next, petitioner claims the Court abused its discretion in rejecting both of his guilty pleas. According to petitioner, his testimony during the plea hearing established the necessary elements of the crime, and provided the proper factual basis for his guilty plea pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P.").

Petitioner claims the Court's determination that he had not done so is reversible error.

As the Court indicated at the plea hearing (Tr., Attempted Pleas, at 16-17), there is no constitutional right to a plea bargain, Weatherford v. Bursey, 429 U.S. 545, 561 (1977), and a court retains discretion to accept o r reject a plea agreement. Fed. R. Crim. P.n11 (e) (2); United States v. LeMay, 952 F. 2d 995, 997 (8th Cir. 1991) (per curiam). Absent an adequate factual basis, the court may not accept a guilty plea. Fed. R. Crim. P. 11(f). In order to offer a sufficient factual basis for conspiracy to commit money laundering, petitioner had to admit both that he and his co-conspirators defrauded auto body shop owners, and that they used or intended to use the fraudulently obtained money to further promote their scheme. See 18 U.S.C. §§ 371, '1956(h) (2002). In both attempts, petitioner failed to make these necessary admissions. Rather, he consistently denied intending to defraud or to engage in illegal activity. (Tr., Attempted Pleas, at 24-25; 26; 31-32.)

Accordingly, his statements regarding his misrepresentations (Id. at 29-30; 31-32) and the use of profits obtained through the scheme (Id. at 30-31) fall short of establishing guilt for conspiracy to commit money laundering. As a result, petitioner's statements did not provide a sufficient factual predicate for the plea, and the Court properly rejected his guilty pleas.

C. Evidentiary Hearing

Lastly, petitioner claims constitutional due process requires a hearing on his § 2255 petition. He can be assured that the Court has thoroughly read his submissions and the law applicable to his legal claims. Federal habeas law provides that when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no

relief," a hearing is unnecessary. See 28 U.S.C. § 2255; see also McNeal v. United States, 249 F.3d 747, 749 n.2 (8th Cir. 2001) . The present case was heard by this Court. As a result, it has detailed, extensive knowledge of the facts and evidence presented. A hearing on the merits of these claims would not enhance the Court's understanding of the issues or facts presented in this motion. Petitioner's request for a hearing is accordingly denied.

III. Certificate of Appealability

The Court has also considered whether issuance of a Certificate of Appealability ("COA") is appropriate. See Tiedeman v. Benson, 122 F. 3d 518 (8th Cir. 1997). In that context, the Court concludes that no issue raised is "debatable among reasonable jurists." Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir. 1994) (citing Lozado v. Deeds, 498 U.S. 430, 432 (1991) (per curiam)). Petitioner has not, then, made the "substantial showing of the denial of a constitutional right" necessary for issuance of a COA. 28 U.S.C. § 2253(c)(2).

Accordingly, based on the files, records, and proceedings herein, IT IS ORDERED that:

1. Petitioner's motion for relief pursuant to 28 U.S.C. 2255 [Docket No. 1921] is denied.

2. No Certificate of Appealability will be issued in this matter.

Dated: August 2nd, 2002

s/ JAMES M. ROSENBAUM
United States Chief District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense.

B. Section 2255 of Title 28, United States Code, provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> ....
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

C. Section 2253(c) of Title 28, United States Code, provides in relevant part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

CERTIFICATE OF SERVICE

I, JOSEPH MARGULIES, a member of the Bar of this Court, hereby certify that, on this the 31st day of March, 2003, I had deposited in the U.S. Mail, Express Mail-overnight postage prepaid, the 40 copies of Petitioner Thomas Green's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in an envelope addressed to Honorable William K. Suter, Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543, and on the same day, I also had deposited in the U.S. Mail, first class postage prepaid, three copies of the foregoing Petition for a Writ of Certiorari in an envelope addressed to William H. Koch, Assistant U.S. Attorney, 600 U.S. Courthouse, 300 South 4th Street, Minneapolis, MN 55415, counsel for Respondent. I further certify that all parties required to be served have been served.

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